United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2112

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

C. A. DOCKET NO. 74-2197

UNITED STATES OF AMERICA

Appellee,

vs.

ZELIG SPIRN

Appellant

PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING IN BANC

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PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING IN BANC

Appellant respectfully petitions the Court to set aside the judgment on appeal rendered herein on the 24th day of February 1975 and to grant Appellant a rehearing of the appeal, or in the alternative, to transfer this cause to the Court in banc, for the following reasons:

The proceeding involves questions of exceptional importance. Many of the questions as set forth herein are of first impression in this jurisdiction and have never been resolved in any court in the United States.

PRELIMINARY STATEMENT

Zelig Spirn petitions this Court with suggestion for rehearing en banc of the affirmance of a judgment by the Court of Appeals, the Honorable Robert P. Anderson, Honorable William Hughes Mulligan, Honorable Ellsworth Van Graafeiland, Circuit Judges presiding.

Indictment 74 Cr. 608, filed on June 17, 1974, and superseding Indictment 73 Cr. 990, charged Spirn with committing acts of juvenile delinquency by assaulting a foreign official in violation Title 18, United States Code, Sections 112 (a) and 2, and Title 18, United States Code Section 5032.

Trial commenced before Judge Tyler on June 17, 1974. At the end of that day, Rein, a co-defendant was found guilty of juvenile delinquency as charged in the Information. On June 18, 1974, Spirn was also convicted of the chargein the Information.

NATURE OF THE CASE

The operative facts, the proceedings below and the precise context in which the issues arose, are set forth in Petitioner's Brief (pp.4 to 8) and may be summarized as follows:

Appellant Spirn and his co-defendant Rein, were charged in an indictment with willfully and knowingly striking a foreign official and official guest in violation of Title 18, U.S.C. Sec. 112 (a) and 2.

Before any testimony was adduced, the Government informed the Court that its witness the Soviet official agreed to a partial waiver of diplomatic immunity only as far as the facts surrounding the incident, but that he would retain his diplomatic immunity privilege to object to any particular question. Counsel objected to this procedure as a limitation on normal cross-examination. The Court in reply thereto stated that its position was consonant with long standing principles of international law and it could discern no disadvantage or prejudice that would accrue to the defense.

GERMAN KOSENKOV, a secretary of second rank with the Russian representation with the United Nations, testified that his office was at 137 East 67th Street and his residence at 257 East 67th Street at the corner of Second Avenue (T27 and 28).

On March 15, 1973 at about 9:00 p.m., Mr. Kosenkov was on the west side of Third Avenue between 67th Street and 70th Street when he

heard two individuals running behind him. He turned around to observe two individuals breathing heavily. This observation encompassed three to four seconds. He continued walking and the two individuals followed approximately two to three feet behind him. When he came to the intersection at 72nd Street and Third Avenue, he stopped for a light. At this point, a red liquid, identified by FBI laboratory tests as beef blood,was thrown at him, hitting him in his face and on his raincoat. Kosenkov turned around and saw two individuals running down 72nd Street towards Lexington Avenue. He observed the individuals from one to three seconds.When the liquid hit him, he acknowledged that he was emotionally upset and very nervous. Kosenkov then identified Rein as one of the young men who had thrown the liquid. He was unable to identify Appellant Spirn as the other individual. (T33).

Thereafter, Kosenkov went to his Mission where he washed himself and then went to the police precinct accompanied by the first secretary to the Russian mission to the United States, Mr. Skotnikov, who acted as translator for Kosenkov. At the police station, Kosenkov testified that he recognized the young men who had assaulted him.

On cross-examination by Sprin's counsel, the Court sustained objections to questions such as whether the witness was a Communist; whether he was a representative of the Soviet Union; whether he knew

the meaning of truth; whether it is part of Communist doctrine to tell a lie and to be permitted to represent it as the truth; whether it is part of Communist doctrine to tell a lie and to be permitted to represent it was the truth if it is in furtherance of an end that is part of the philosophy of the Communist government; whether as a diplomat he is informed of the relationship between the United States government and the Soviet government; whether he is involved in the suppression of the rights of the Soviet Jews; whether his duties are concerned with Exit Visas to those Jews who desire to emigrate from the Soviet Union and reside in the State of Israel; whether it is part of the policy of the Soviet Government to destroy the Jewish State of Israel.

The court admonished counsel that such questions would not be permitted, stated that they were totally irrelevant in the context of this case, and denied counsel an opportunity to be heard on the matter (T56 and 57).

DETECTIVE DAVID GREENBERG testified that on the night in question he was traveling in a taxi with two companions en route to a live radio show. After observing a man falling to the ground and two males bending over him and then running away, he instructed the cab driver to pursue the two males. When Greenberg hollered for the males to stop, they obeyed and put their hands up.

The Government then rested. The co-defendant Rein also rested without introducing any testimony.

The Court then made its finding as pertaining to the co-defendant Rein. In the aforementioned findings of fact the Court stated that both defendants perpetrated the act in question (T131).

The following day the hearing continued as to defendant Spirn. Defendant's counsel produced Detective Greenberg as his own witness. The Petitioner Spirn then rested.

The Court then adopted the background findings of fact with respect to Rein's decision and included same in his findings of guilt as to Spirn (T185 to 191). The Petitioner was sentenced to a probationary term not to exceed his minority. The Court of Appeals for the Second Circuit affirmed the judgment of the Court below on 24th day of February ,1975.

ARGUMENT

The Court omitted to accord proper weight to the trend of national decisions and judicial precendents in deciding the issue raised in Point One of the defendant's Brief as to defense counsel's right of cross-examination. Defendant contends that the Court erred in precluding the defense counsel from cross-examining the prosecution witness in any areas that would have an important bearing on the truthfulness of the witnesses testimony. Such abuse of

discretion by the trial Court constituted reversible error both as an abuse of discretion and a denial of Sixth's Amendment rights of confrontation and assistance of counsel. The fact that the witness was an attache of the Russian Mission to the United Nations and claimed a limited immunity does not bar defense counsel from impeaching his credibility or delving into valid areas of cross-examination.

It is submitted that the Court of Appeals has overlooked or misapprehended the denial of the due process right of confrontation when counsel for defendant was foreclosed from delving into the possible existence of prosecution witness'smotive to falsify testimony.

In U.S.. v. Jorgenson, 451 F.2d 516, 519 (10th Cir. 1972) it was stated that:

> "The right of confrontation extends to areas of cross-examination. An area which is properly subject to cross-examination cannot be denied the accused. A limitation which prevents cross-examination into an area which is properly subject to cross-examination does constitute reversible error. The characteristic feature in this situation is the complete denial of access to an area which is properly the subject of cross-examination; the extent of cross-examination is discretionary with the trial judge. Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968). This distinction has been long recognized by this Court. In Arnold v. United States, 94 F. 2d 499 (10th Cir. 1938), we stated at 506:
>
> A reasonably full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege of the party against whom he is called, and as

> a rule, a denial of this right is prejudicial error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary."

The Federal courts, in general, and the Second Circuit in particular has specifically ruled that motive, bias or interest of a witness is not a collateral matter and is the proper subject of cross-examination.

On this point the Second Circuit has stated:

> "As previously stated by Judge Medina of this Court in United States v. Lester, 248 F.2d 329, 334 (2nd Cir. 1957), '(a)lthough a party may not cross-examine a witness on collateral matters in order to show that he is generally unworthy of belief and may not introduce extrinsic evidence for that purpose***a party is not so limited in showing that the witness had a motive to falsify the testimony he has given.' Thus, "bias or interest of a witness is not a collateral issue, and***extrinsic evidence is admissible thereon.' United States v. Battaglia, 394 F. 2d 304, 314 n.7 (7th Cir. 1968)." U.S. v. Haggett, Jr. 438 F2d 396, 399 (2nd Cir. 1971).

> "Ordinarily, extrinsic evidence may not be used to impeach a witness's general credibility or his specific testimony on a collateral matter. But evidence which is probative of a special motive to be or fabricate a case agains a defendant is admissible because it bears directly on the issue of the defendant's guilt." U.S. v. Kinnard, 465 F.2d 566, 573 (Dist. of Col. 1972)

Since the witness was a secretary of second rank with the Russian representation to the United Nations and the defendant was involved in protesting the Russian discrimination of Jews

it was error for defendant's counsel to be foreclosed in developing the fact that the witness, perhaps, would be subject to critism by his superiors if he testified contrary to what they expected of him in view of the circumstances.

The Second Circuit has dealt with this particular issue in United States v. Lester, 248 F.2d 329 at 334 (2nd Cir. 1957):

> "...and it is permissible to show that contrary testimony would subject the witness to criticism by his superiors, Atlantic Coast Line R. Co. v. Dixon, 5 Cir. 207 F.2d 899, 904."

Defendant's counsel cross-examination began as follows (T54-56):

> Q. Mr. Kosenkov, are you a Communist?
>
> Mr. Rakoff: Objection.
>
> The Court: Sustained.

In Fawick Air Flex Co., Inc. v. U.E.R.M.W.A. local 735, 92 NE2d 436 (Ct. of Appeals of Ohio 1950) the appllate court sustained defense counsel's question of whether the witness was a member of the communist party, stating:

> "Gradually the fundamental principles of the Communist Party have become matters of public knowledge. Their social and political theories are vastly different than those understood and supported by the loyal citizens of our democracy. Our fundamental beliefs are held at naught and have no binding effect in directing their social relations. It has been demonstrated times without number in recent years in trials and hearings before constituted public committees and bodies the fact that a member of the Communist Party is not bound by his oath under any circumstances.

> They feel no binding force to the sanctity of an oath. Judges and courts will not shut their minds to truths that all others can see and understand. It therefore is clearly demonstrated that the question ofmembership in the Communist Party is competent where there is some background for it to test the credibility of a witness." Fawick, 92 NE 2d at 445.

The United States contends on page 14 of its Brief before U.S. Court of Appeals:

> "...we respectfully submit that a trial judge sitting without a jury should have a broader discretion to preclude such an inquiry if he finds it irrelevant to the factual determinations he must make, whatever its admissibility might be if the trier of fact were a jury."

The right to cross-examination is to be safeguarded, according to the 2nd Circuit, when the witness is one testifying on behalf of the government. In U.S. v. Fitzpatrick, 437 F2d 19 (1970) this Circuit held:

> "The Government relies on the fact that the instant case, unlike the cases discussed above, was tried to a judge rather than a jury; and it argues that for Judge Rayfiel to continue the cross-examination once he had become conviced of the government's identification testimony would have been a waste of time. We disagree. The absence of a jury should make no difference since a defendant must be allowed a full and fair opportunity to test and explore incriminating testimony."

Defendant's counsel was alsoprevented from cross-examinating the witness in regard to the possible prejudice the witness may have for the defendant because of the defendant's belonging to a particular group.

In U.S. v. Kartman, 417 F.2d 893, 897 (9th Cir. 1969), in recognizing that prejudice, as an inducing motive to falsify testimony, is a valid area of cross-examination, the court at page 897 stated:

> "Prejudice toward a group of which defendant is a part may be a source of partiality against the defendant. He is therefore entitled to a reasonable opportunity to cross-examine witnesses as to the existence of any such prejudice, and its possible effect upon their testimony. Jacek v. Bacote, 135 Conn. 702 68 A.2d 144, 146 (1949). Magness v. State, 67 Ark., 594, 50 S.W. 554 59 S.W. 529 (1899; see also People v. Christie, 2 Abb. Pr. 256, 259, 2 Park Cr. R. 579, 583 (N.Y.S. Ct. 1st D 1855); United States v. Lee Huen, 118 F. 442, 463 (N.D.N.Y. 1902) (dictum)."

The Petitioner contends that the Court of Appeals has overlooked or misapprehended the principle that the trial Judge's discretion does not become operative until the party has had opportunity to cross-examine the chosen area:

> "The scope of cross-examination and the limits upon it are committed to the discretion of the trial court and will not be interfered with by an appellate court absent [illegible]buse of discretion ...However, the full cross examination of the witness is a right and it is only after a party has had the opportunity to exercise the right of cross-examination that the discretion becomes operative...Here the right was terminated before it could be exercised. The court should have permitted the question." Grant, 368 F.2d at 661, supra.

The Second Circuit has expressed this doctrine in the following words:

> "We agree that complete preclusion of cross-examination as to motive for testifying is an abuse of discretion; but beyond that, the issue is whether defense counsel had an opportunity to bring out considerations relevant to motive or bias. Here, counsel was not prevented from adequately establishing such a motive, and the issue was fairly put to the jury in the court's charge." U.S. v. Mahler, 363 F2d 673 677 (2nd Cir. 1966).

In the case at bar the defendant's counsel was not allowed any access to cross-examine as to motive. This was a denial of the right of confrontation. Since the defendant was not allowed to even penetrate this area, the court's power of discretion had not yet become operative.

In discusssing the fact that the trial judge sat without a jury the Second Circuit has stated:

> "Even a judge who appears to have made up his mind on the basis of what he has heard, may be moved to reasonable doubt in the light of what may develop from full cross-examination on relevant matters." Fitzpatrick, 437 F. 2d at 25.

> "Despite fact that case was tried to a judge, rather than a jury, and despite convincing nature of government's identification testimony, defendant had to be allowed a full and fair opportunity to test and explore by cross-examination the government's incriminating identification testimony." U.S. v. Fitzpatrick,437 F.2d19 (1970)at 25.

The Petitioner contends that the Court of Appeals has overlooked or misapprehended the trial court's plain error in determining the existence of defendant's guilt prior to the presentation of his defense.

Due to the request from co-defendant's counsel to terminate his section of the case (T127-20 to 23), the court stated that it would make special findings that affected the co-defendant Rein (T128-10to115); but in disregard of the fact that the findings were to pertain solely to the co-defendant Rein, the judge stated as a finding that:

> "I find further that it was done wilfully and knowingly by the two defendants in question; that they intended this result; that they knew what they were doing and it didn't happen by innocence or mistake." (T131-3to6)

At the time this finding was made, the trial as to the guilt of the defendant Sprin was still in progress. There was no request at that time for a finding respecting the guilt of the defendant Spirn by Sprin's counsel. The defense had not yet been presented. Later a defense witness was produced. Who can say whether the judge's premature finding of guilt foreclosed his objective consideration of this testimony?

In commenting upon the aspect of a fixed opinion by a trial judge, the Second Circuit in United States v. Brandt, 196 F.2d 653 (1952) U.S. Court of Appeals, Second Circuit, stated on page 656:

> "Because of his proper power and influence, it is obvious that the display of a fixed opinion as to the guilt of an accused limits the possibility of an uninhibited decision from a jury of laymen much less initiated in trial procedure than he. He must, therefore, be on continual guard that the authority of the bench

be not exploited toward a conviction he may privately think deserved or even required by the evidence. United States v. Minuee, 2 Cir. 114F.2d 36; Martucci v. Brooklyn Children's Aid Soc., 2 Cir., 140 F2d 732; United States v. Marzano, 2 Cir. 149 F.2d 923.

In the case at bar this mandate of judiciousness appears to have been breached on unfortunately more than a single occasion. Thus the examination of witnesses and discussions with counsel by the court were spotted with a number of remarks which were not of the form to elicit information or direct the trial procedure into proper channels, but rather to cut into the presumption of innocence to which defendants are entitled."

It is submitted that although the above comments were made in a jury trial, they are equally applicable to a non-jury case.

In United States v. Fitzpatrick, United States Court of Appeals, Second Circuit, 1970, the court at page 25 stated:

"The government relies on the fact that the instant case, unlike the cases discussed above, was tried to a judge, rather than a jury; and it argues that for Judge Rayfiel to continue the cross-examination once he had become convinced of the government's identification testimony would have been a waste of time. We disagree. The absence of a jury should make no difference since a defendant must be allowed a full and fair opportunity to test and explore incriminating testimony."

Later, on the same page 25, the court stated:

"....Even a judge who appears to have made up his mind on the basis of what he has heard, may be moved to reasonable doubt in the light of what may develop from full cross-examination on relevant matters."

In U.S. v. Cascade Linen Supply Corp. of New Jersey, 169 F. Supp.

565 (S.D.N.Y. 1958), the Court observed on Page 568:

> "...The obligation to measure the evidence against the rule of reasonable doubt arises only when both sides have rested, and this is as true in a case tried to a jury as it is in one in which a jury is waived. This obligation cannot arise from a resting of Government's case alone and a motion for acquittal. In this posture, the moving defendants are entitled to invoke the Court's power to enter a judgment of acquittal as a matter of law, but not to impose the duty of rendering the final termination of the proof and is the final conclusion of the trier of the facts on the totality of evidence. Short of the resting of both sides there can be no totality of evidence, no obligation to render findings, and necessarily, no occasion for applying the rule of reasonable doubt."

It is respectfully submitted that the Court's premature finding of guilt of the defendant Spirn "qualifies as plain error, that is, legal impropriety...prejudicially affecting the substantial rights of the defendant and sufficiently grevious to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 528 (Supreme Court of New Jersey 1969, cert. den. 399 U.S. 920 (1969)).

CONCLUSION

Wherefore, Petitioner respectfully requests that this case be reheard and suggests that such rehearing be before the Court en banc.

Respectfully submitted,

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March 24, 1975

Clerk
U.S. Court of Appeals
United States Court House
Foley Square
New York, New York

Re: United States of America vs. Zelig Spirn
C.A. Docket No. 74-2197

Dear Sir:

I herewith send you original and 13 copies of Petition for Rehearing with Suggestion for Rehearing In Banc. On one of these enclosures I have affixed my signature and you may regard this as ~~be~~ the original Petition.

Kindly acknowledge receipt on the attached post card.

Sincerely yours,

ROBERT S. PERSKY

RSP:mt
Enc.

CERTIFICATION

I hereby certify and affirm that I have transmitted a copy of the Petition for Rehearing with Suggestion for Rehearing In Banc to the United States Attorney by mailing him a copy of same.

Dated:March 24, 1975

ROBERT S. PERSKY